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Supreme Court, U.S.
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In The

Supreme Court of the United States

JAMES RAY CREED,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

On Petition For A Writ Of Certiorari To The Arkansas Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether A State Requirement For Mental Examinations Of A Criminal Defendant Who Asserts His Mental Condition As A Defense To A Crime Requires The State-Appointed Psychologist To Consider Previous Mental Treatment Records In Order To Satisfy Due Process Under The United States Constitution.

PARTIES TO THE PROCEEDING

The parties to the proceeding are James Ray Creed, Petitioner, who is a citizen and resident of the State of Arkansas, and the State of Arkansas, Respondent.

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PETITION FOR A WRIT OF CERTIORARI

James Ray Creed respectfully petitions for a writ of certiorari to review the judgment of the Arkansas Supreme Court in this case.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court is reported at *Creed v. State*, ___ S.W.3d ___, 2008 W.L. 252012, 2008 Ark. LEXIS 154, (No. CR 07-556, January 31, 2008), *reh'g denied*, 2008 Ark. LEXIS 157 (March 6, 2008), and was a final order from which comes this appeal. That court's denial of the rehearing request brings the Petitioner before this Court since the State Supreme Court's ruling means that a cursory mental examination is sufficient, in its view, to comport with due process under the United States Constitution's Fifth Amendment as applied to the states by the Fourteenth Amendment. This ruling impacts not only the Petitioner but others in the state judicial system.

JURISDICTION

The judgment of the Supreme Court of the State of Arkansas denied a requested rehearing on the specific issue of whether a cursory mental evaluation of a criminal defendant was sufficient to comply with federal constitutional due process, and the court's decision denying rehearing was entered on March 6,

2008. The jurisdiction of this Court rests upon 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2111 provides:

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

U.S. Const. amend. V states:

> "No person shall . . . be deprived of life, liberty or the pursuit of happiness without due process of law . . . "

U.S. Const. amend. XIV states:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ark. Code Ann. § 5-2-305(b)(1) states:

> "[T]he court shall enter an order (A) directing that the defendant undergo an examination and observation by one (1) or

more qualified psychiatrists or qualified psychologists."

Ark. Code Ann. § 5-2-305(g)(3) states:

"3) The court may require the attorney for the defendant to provide any available information relevant to the forensic examination, including, but not limited to a:

"(A) Psychiatric record;

"(B) Medical record; or

"(C) Record pertaining to treatment of the defendant for substance or alcohol abuse."

STATEMENT OF THE CASE

Petitioner James Ray Creed was charged with rape under Arkansas law, Ark. Code Ann. § 5-14-103, and he raised as an affirmative defense that he had a mental defect, under Ark. Code Ann. § 5-2-305(a)(1), and required a psychiatric expert. In accordance with a state statute, Ark. Code Ann. § 5-2-305, there was an evaluation by a state psychologist who opined that the Petitioner was competent. The examiner did not review or consult with any of the Petitioner's prior mental health treatment providers. Petitioner filed two motions for another psychiatric evaluation with averments that he had a long-standing mental health treatment history and provided names of his treating

psychologists and psychiatrists. The petitions were denied by the state court judge.

The Petitioner raised his need for an additional and adequate mental health evaluation by motions filed in the trial court which were denied, and further before the Arkansas Supreme Court as necessary under the United States Constitution, Amendment V and as applicable to the states by Amendment XIV. The Arkansas Supreme Court rejected these arguments.

The Petitioner went to trial without psychiatric testimony in his behalf and was convicted and sentenced to life in prison in Arkansas. Judgment and Commitment Order R. 116, Add. 8. He appealed to the Arkansas Supreme Court, R. 118, Add. 42, and the Arkansas Supreme Court rejected his arguments that the state mental examination violated the federal constitution, affirming his conviction by a decision of January 31, 2008. *Creed v. State*, ___ S.W.3d ___, 2008 W.L. 252012, 2008 Ark. LEXIS 154, (No. CR 07-556, January 31, 2008), *reh'g denied*, 2008 Ark. LEXIS 157 (March 6, 2008). Petitioner filed a motion for rehearing on February 19, 2008, which again raised the constitutional impediment under federal law to the state mental examination, and this challenge was denied by an Order on March 6, 2008, which was a final order of the highest state appellate court, from which Petitioner seeks this Court's Certiorari, based on 28 U.S.C. § 1257(a). This Court should grant Certiorari on the grounds in Supreme Court Rule 10(b) and (c), as the State of

Arkansas' statute was applied in a way which violates federal constitutional rights and privileges, in violation of the decisions of this Court and others, under *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L.Ed. 2d 53 (1985), and progeny.

The evidence before the trial court showed that the Petitioner had a history of mental problems and was indigent. R. 43, Add. 15. At the time of the offense of which he was charged, Petitioner was age 16. He had previous mental treatment and evaluation. R. 102, Add. 34; R. 103, Add. 35. Petitioner filed a Motion for Psychiatric Evaluation, R. 43, Add. 15. The state statute, Ark. Code Ann. § 5-2-305(a)(1), requires Arkansas to conduct an evaluation in such cases.

The State of Arkansas appointed a mental evaluation, and that Forensic Report of October 2, 2006 found Petitioner competent. R. 47, 48, Add. 17, 18 The state psychologist listed in his Forensic Report all records that he ordered, and none were of the prior treatment history, according to his report. R. 48, Add. 18. Appellant's request for independent mental examination came in two motions, following the state report. The first, November 1, 2006, R. 73, Add. 26, quoted the state report that there was "a lack of history of mental illness or mental disease which could have impaired his ability to confirm his behavior to the requirements of the law," and that the state evaluation found Petitioner to be suffering from mental retardation when examined. Motion, R. 73, Add. 26. It noted also that Petitioner could not afford a private psychiatric examination. Motion, R. 74, Add.

27. The trial court denied it on November 22, 2006. R. 76, Add. 5. The second Motion sought a continuance and noted the need to obtain testimony to rebut the state psychologist, filed on November 17, 2006, R. 80, Add. 29, and another continuance motion followed, R. 96, Add. 32, and R. 102, Add. 34, denied, and in that motion listed records from six providers, noting the Petitioner had been treated as early as 1985 for psychological problems. R. 103, Add. 35. The brief in support said so as well. R. 110 The Renewed Motion for Continuance, filed on November 30, 2006, noted that defense counsel had learned that Petitioner had been treated since 1985 "for various psychological problems" at the following institutions: James Developmental Center, Little Rock Arkansas; Petit Developmental Center, Malvern, Arkansas; The Arkansas Children's Hospital; Counseling Clinic, Malvern, Arkansas; Social Security Administration (Disability); and Dr. Paul Deube (Evaluation 4301). R. 103-04, Add. 35-36. The State-appointed psychologist generated a report and listed each source of his records. The documents did not include *any* of the foregoing. R. 47-48, Add. 17-18. The state judge denied the motions, and the case went to trial on December 1, 2006.

The state psychologist testified that he did not order any of the Petitioner's prior treatment records before rendering his report, or even up to the date of trial. He testified that the Petitioner had mental retardation, was deaf, and had a third grade reading level, R. 474-75, Ab. 163-64, and his examination lasted two hours. R. 476, Add. 164. He was unaware

Petitioner had prior mental problems, R. 55, Add. 25. The witness conceded that he was aware that Petitioner did not begin talking until age three. R. 477, Add. 164. During the trial, witnesses testified to the Petitioner's mental problems since a child. R. 535, Ab. 194 (Pastor), and R. 519-20, Ab. 187, noting he had been molested as a child. R. 521-22, AB. 188 (Mother).

The Petitioner's brief to the Arkansas Supreme Court noted the state violation of his federal constitutional rights by a cursory mental evaluation in failing to order or consider past treatment records, citing specifically *Ake v. Oklahoma* and other case law. Brief, at 12, 14-16, noting that this Court in *Ake* ruled that there must be a "competent and appropriate evaluation." The Brief concluded that "the cursory nature of the examination in this case, standing alone, is enough to invalidate the examination, grant experts and allow a new trial. What occurred in this case was insufficient to meet the Appellant's due process rights under the Arkansas and federal constitutions." Brief, at 17.

In the Petition for Rehearing that was filed, Petitioner also continued his challenge under federal constitutional law, noting that under *Ake*, *one is entitled to an "appropriate examination"* (*Id.*, emphasis supplied). Petitioner concluded that due process guarantees more than was done here.

In denying the initial appeal, the Arkansas Supreme Court wrote, "In the present case, appellant was examined at the state hospital, and, thus, the requirements under *Ake* were satisfied." 2008 W.L. 252012. In denying the Petition for Rehearing, the

Supreme Court wrote "Petition for Rehearing" denied, without more explanation.

REASONS FOR GRANTING THE PETITION

THE DECISION BELOW IS IN CONFLICT WITH OTHER DECISIONS AND INCORRECTLY ALLOWS A CURSORY MENTAL EVALUATION WHICH DOES NOT COMPORT WITH FEDERAL DUE PROCESS GUARANTEES.

Ake v. Oklahoma, 470 U.S. 68 (1985), requires that a state must provide an indigent criminal defendant accused of a crime in which his mental condition is in issue with an "appropriate" mental health evaluation. In Arkansas, the Legislature passed a statute in response to this Court's decision which sets out the requirements for the state to meet, including that its evaluation must be by a competent psychologist or psychiatrist. Ark. Code Ann. § 5-2-305(b)(1), and the statute further requires that the State will obtain records, noting that the court may require the attorney to provide copies of psychiatric, medical and other records. Ark. Code Ann. § 5-2-305(g)(4). This presupposes that the evaluator will consider previous records.

Petitioner's counsel in his initial motion for an evaluation noted that Petitioner "has a history of mental problems." Motion for Psychiatric Evaluation filed August 30, 2006, R. 43, Add. 15. The trial court granted an order for evaluation. R. 45. Add. 2. The

evaluator never considered prior treatment records, as his report does not include them in his items reviewed, and his trial testimony admits as much. He said that he was unaware of prior problems and reviewed limited records. R. 55, Add. 25, R. 48, Add. 18, R. 103, Add. 35.

Following this Court's pronouncement in *Ake v. Oklahoma*, several courts have noted that a cursory mental evaluation does not satisfy due process requirements. *State v. Paynter*, 206 W. Va. 521, 526 S.E.2d 43, 50-51 (W. Va. Ct. App. 1999) (noting this is a fundamental due process right, requiring state statute be complied with); *Engle v. State*, 774 P.2d 1303, 1311-12 (Wyo. 1989) (noting this fundamental right to a sufficient examination complying with state statute); and, *United States v. Burgin*, 440 F.2d 1092 (4th Cir. 1971) (noting a conviction must be reversed due to lack of examination). These cases show a criminal defendant is entitled to more than a minimal, incomplete evaluation under federal constitutional guarantees of due process and confrontational rights under the Fifth, Sixth and Fourteenth Amendments. Petition for Rehearing, at 7.

While the State gave short shrift to the argument that there must be an adequate examination, the federal guarantees prohibit a state from providing only a hasty and inadequate mental evaluation. *Blake v. Zant*, 513 F. Supp. 772, 785 (S.D. Ga. 1981) (inadequate, hasty examination improper). *Accord, McCollum v. Bush*, 344 F.2d 672, 672 n.1 (5th Cir. 1965) (per curiam opinion noting short mental examination over

lunch inadequate); *Buttrum v. Black*, 721 F. Supp. 1312, 1368 (M.D. Ga. 1989) (reversing since examiner failed to provide "minimum" level of assistance under *Ake*), *aff'd*, 908 F.2d 695 (11th Cir. 1990). *See also Long v. United States*, 360 F.2d 829, 835 (D.C. Cir. 1966) (noting Defendant's witnesses could have prevented testimony that commitment for examination was inadequate). *See generally "The Constitutional Right to Psychiatric Assistance: Cause for Reexamination of Ake,"* 30 Am. Cr. L. Rev. 1329, 1351 (Summer, 1993) (opining that there is no clear standard for the states to follow, as unanswered questions remain after, including "the adequacy of services to be provided").

This Court should hear this case and further expand on what is an adequate examination since the courts are split on this issue. *Wilson v. Greene*, 155 F.3d 396, 401-02 (4th Cir. 1998) (noting one is not entitled to a certain proficiency in an examination, or there would be many disputes); *In the Personal Restraint Petition of Rice*, 828 P.2d 1086, 1096-97 (Wash. 1992) (en banc) (fact that examiner did not follow recommendations of another or opinions differed did not make it inadequate). Many cases decide the issue based upon factual grounds, but it is clear that there is no bright-line standard as to what this Court requires in the form of an adequate examination. *See generally Wilkins v. Maryland*, 402 F. Supp. 76, 82 (D. Md. 1975) (disagreement over sufficiency of four-day evaluation did not deny due process), *aff'd*, 538 F.2d 327 (4th Cir. 1976), *cert. denied*, 429 U.S.

1044 (1977); *Matlock v. Rose*, 731 F.2d 1236, 1243 (6th Cir. 1984) (rejecting challenge to sufficiency of examination, noting no evidence it impaired defense or was fundamentally unfair), *cert. denied*, 470 U.S. 1050 (1985); *Alvoid v. Wainwright*, 564 F. Supp. 459, 484 (M.D. Fla. 1983) (allegation by examiner eight years later that he made it "under adverse circumstances" inadequate to show trial court erred in denying further evaluation). *But see State v. Clabourne*, 146 Ariz. 335, 342-43, 690 P.2d 54, 61-62 (1984) (holding psychological examination was adequate, but noting that examiner was aware of childhood psychological problems and evaluation was "not so cursory or uninformed as defendant would have us believe.").

The Arkansas court attempted to follow this Court's guidance in *Ake v. Oklahoma*, but it fell short. This Court should take this as an opportunity to give states direction as to whether an "adequate examination" includes review of a criminal defendant's history of mental problems.

This Court should grant Certiorari in this case, not only for the sake of this criminal defendant's future but for innumerable others who have a mental disease or defect defense and are given an examination at state expense, which will be their only one before their trial.

CONCLUSION

For the aforementioned reasons, the Petitioner respectfully requests that the Petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

SUPREME COURT OF ARKANSAS

No. CR 07-556.

JAMES CREED APPELLANT, VS. STATE OF ARKANSAS, APPELLEE.	**Opinion Delivered** January 31, 2008 AN APPEAL FROM THE CIRCUIT COURT OF HOT SPRING COUNTY, ARKANSAS, NO. CR-2006-195-2, HONORABLE PHILLIP H. SHIRRON AFFIRMED.

TOM GLAZE, Associate Justice

On November 1, 2002, Malvern police officers responded to a report of a rape. The victim told the police that she heard her doorbell ring and when she opened the door slightly, an intruder rushed through. She stated that the intruder held a knife with a long blade in one hand and a rag with a strong chemical odor, which he tried to place over her face. The intruder placed the knife to the victim's throat, forced her onto the floor of the laundry room, and ordered her to disrobe. After she removed her shirt, the intruder forced her to perform oral sex in the presence of her children, who stood next to her crying. The victim provided police with a detailed description of the intruder's physical appearance and clothing, but stated that she did not recognize him. A

semen sample was collected from the crime scene found on the laundry room floor.

Although the DNA profile prepared by the Arkansas State Crime Lab did not provide a match for a suspect at that time, in October 2004, the Crime Lab notified the Malvern Police Department that a DNA search had produced a positive match to an inmate named James Ray Creed at the Deerfield Correction Facility in Ionia, Michigan. Following his transport to Arkansas, a trial was held, and a jury convicted Creed of rape and sentenced him to life in prison.

For his first point on appeal, Creed argues the trial court erred by denying his motions for a continuance and for the appointment of additional experts. We review a denial of a motion for continuance under an abuse-of-discretion standard, *see, e.g., Smith v. State,* 352 Ark. 92, 98 S.W.3d 433 (2003), and an appellant must demonstrate that the trial court's abuse of its discretion resulted in prejudice amounting to a denial of justice. *See Cherry v. State,* 347 Ark. 606, 66 S.W.3d 605 (2002). Ark. R. Crim. P. 27.3 (2004) provides that a court shall grant a continuance "only upon a showing of good cause and only for so long as necessary, taking into account not only the request or consent of the prosecuting attorney or defense counsel, but also the public interest in prompt disposition of the case." Other factors a trial court should take into consideration include: (1) the diligence of the movant; (2) the probable effect of the testimony at trial; (3) the likelihood of procuring the

attendance of the witness in the event of a postponement; and (4) the filing of an affidavit, stating not only what facts the witness would prove but also that the appellant believes them to be true. *Stenhouse v. State,* 362 Ark. 480, 488-89, 209 S.W.3d 352, 358 (2005).

The trial court issued an order granting Creed's motion for a psychiatric evaluation on August 30, 2006, and clinical psychologist Ron Faupel performed the evaluation on September 20, 2006 – the same day the trial court granted Creed's motion for substitution of counsel. On November 1, 2006, Creed filed a motion requesting the appointment of psychiatric and DNA experts, and he filed another motion for a continuance on November 17, 2006, stating that he had "not had sufficient time to review the scientific material as well as the facts against him." Creed informed the court that he had been in contact with a psychiatric expert in Little Rock, but the expert could not conduct an independent mental evaluation before the trial date of December 1, 2006. The trial court issued orders denying Creed's motion on November 22, 2006, following pre-trial hearings. On November 30, 2006, the day before trial, Creed filed a renewed motion for a continuance, which the court denied.

In *Ake v. Oklahoma,* 470 U.S. 68 (1985), the Supreme Court held that where an indigent defendant makes a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the State must provide access to a psychiatrist's assistance on the issue if the defendant

cannot afford one. Ark. Code Ann. § 5-2-305 (Repl. 2006) provides the statutory procedures to be followed when the defense of mental disease or defect is raised, and in *Dirickson v. State,* 329 Ark. 572, 576-77, 953 S.W.2d 55, 57 (1997), we addressed *Ake* and § 5-2-305, stating the following:

> We have repeatedly held that a defendant's right to examination under *Ake* is protected by an examination by the state hospital as provided by this statute. An evaluation performed under this section does not normally require a second opinion, and further evaluation is discretionary with the trial court. Stated simply, the State is not required to pay for a defendant to shop from doctor to doctor until he finds one who will declare him incompetent to proceed with his trial. In the present case, appellant was examined at the state hospital, and, thus, the requirements under *Ake* were satisfied.

At the pre-trial hearing on November 20, 2006, the State objected to Creed's motions for continuances and argued that Creed should have selected another expert when he knew the one he had selected was unavailable before the trial date. The trial court addressed the issue of an appointment of an additional expert for a mental evaluation and a continuance, and said:

> [T]he forensic examination is very thorough, well recognized tests have been performed, Dr. Faupel sets out clearly not only his tests, but his findings. If at all, [Creed] falls in the

> range of mild retardation, it's not a defense. The statements from the Prosecutor based on exigency of this matter, convinced the Court that the motion should be denied. Dr. Diner can make himself available. If we need to transport [Creed] to Dr. Diner, we'll do that today, or tomorrow, or whatever is necessary, if you'll get me a transport order. That's the Court's order.

At another pre-trial hearing held on November 22, 2006, the Court again denied Creed's motions for continuances, stating the following:

> [T]he defendant has had ample time throughout this period from the time of his arrest and he's had counsel since August beginning with Ms. Lemons and then passed off to you, your firm, sometime between August and September, I believe . . . I told [Creed's attorney of record] that if he wishes transport of the defendant, if he'll give me the transport order and if I can't be located, Judge Williams, either one of us can sign it and we will help you get him there, provided – assuming that the doctor couldn't come down here and couldn't get off, couldn't get there, but we'll work him in, we will get him in there for that session.

We find no abuse of discretion. The trial court denied Creed's motion for the appointment of an additional mental expert to conduct an independent evaluation because the court-ordered evaluation was thorough and conformed with all the requirements of

§ 5-2-305(d). Further, the court repeatedly emphasized that it was willing to transport Creed to an expert of his choice for an additional evaluation before trial.

Turning to the issue of Creed's motion for appointment of a DNA expert and continuances to secure a DNA expert, we closely examine such denials that deprive a defendant the chance to have an independent review of a DNA analysis. *Swanson v. State,* 308 Ark. 28, 823 S.W.2d 812 (1992). However, while the court carefully examines a denial of a continuance to procure a DNA expert, this court will not reverse the denial when the accused did not provide an expert's name to the circuit court. *See Hill v. State,* 321 Ark. 354, 902 S.W.2d 229 (1995). In *Munoz v. State,* 340 Ark. 218, 9 S.W.3d 497 (2000), we held that a trial court did not abuse its discretion when it denied a motion for continuance where the State's DNA results were available for almost four months before the trial date, and Munoz had waited until almost a week before trial to request a DNA expert. Although Munoz had months to locate an expert witness and arrange for an independent review of the evidence, he could not support his motion for a continuance with the name of a potential expert, nor could he offer any prospects of securing such a witness in the near future.[1]

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[1] Opposing Creed's motion for appointment of a DNA expert at State expense, the State argued that Creed was not indigent.

(Continued on following page)

Creed's own argument admits that the State made it clear that DNA evidence would be an issue at trial when the State requested that the court order Creed to submit DNA samples in a hearing held on August 23, 2006. Although Creed's substitution of counsel took place on September 20, 2006, he argues that the trial court erred in not granting a continuance to "develop the evidence" and hire a rebuttal expert. Similar to the situation in *Munoz, supra,* the trial court denied Creed's motion for a continuance here after he had over three months to secure a DNA expert. *See also Swanson, supra; Hill, supra.*

Finally, Creed argues that the trial court erred in denying his motions for continuances because he needed more time to locate alibi witnesses. But Creed's counsel made it clear at the pre-trial hearing on November 20 that there was little likelihood of procuring an alibi witness. Accordingly, the trial court did not abuse its discretion in denying Creed's motions for appointment of experts and for continuances.

For his second point, Creed argues that the trial court erred by allowing evidence of prior bad acts, such as: (1) testimony by Malvern police officer Chad

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Creed told the trial judge that he had recently been granted an inheritance, although he was uncertain of the amount and time of distribution of the estate. At a pretrial hearing Creed's counsel asked for the State to pay for a DNA expert for Creed and suggested that Creed could reimburse the State after his inheritance was settled. Creed's retained counsel could have as easily made a similar arrangement.

Almond; (2) a letter the State offered as an exhibit showing Creed's last known address as the "Deerfield Correctional Facility"; (3) a document containing Creed's statement admitting an attempted sexual assault with intent of forcible oral penetration; and (4) documents showing Creed guilty of an assault in 2001.

Any reference to a defendant's prior convictions during the guilt phase of a criminal trial invariably results in some prejudice; however, "the trial court is granted a wide latitude of discretion in granting or denying a motion for a mistrial, and we will not reverse the decision of the trial court except for an abuse of that discretion or manifest prejudice to the complaining party." *Hamilton v. State,* 348 Ark. 532, 541-42, 74 S.W.3d 615, 620 (2002).

During direct examination, Officer Almond stated that a letter from the Arkansas State Crime Lab indicating it found a DNA match with Creed; the letter listed Creed's last known whereabouts as a correctional facility in Michigan. The trial judge denied the motion for a mistrial at that point as premature because he had already determined that evidence of the particular crime for which Creed was incarcerated in Michigan would be allowed at trial under Ark. R. Evid. 404(b).

Rule 404(b) allows evidence of other crimes, wrongs, or acts to be admitted for the purpose of showing "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or

accident." Evidence is not admissible under Rule 404(b) if it is offered to show a defendant's bad character traits and to show that he acted in conformity with those traits in committing crimes presently charged. The evidence must be independently relevant, which means that it has the tendency to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence. *Williams v. State,* 343 Ark. 591, 36 S.W.3d 468 (2001). Any circumstance that links a defendant to the crime or raises a possible motive for the crime is independently relevant and admissible under Rule 404(b). *Jackson v. State,* 359 Ark. 297, 197 S.W.3d 468 (2004). Like other evidentiary determinations, balancing of the probative value of evidence against prejudicial effect is a matter left to the trial judge's sound discretion. *Id.*

Other recent cases before this court involving similar circumstances and Rule 404(b) issues are instructive here. In *Morris v. State,* 367 Ark. 406, ___ S.W.3d ___ (2006), we held that the testimony of a witness about her rape by the defendant was sufficiently similar to another victim's allegations of rape to be admissible as proof of motive, intent, preparation, plan, and scheme pursuant to Rule 404(b). In *Fells v. State,* 362 Ark. 77, 207 S.W.3d 498 (2005), the court ruled that testimony by a previous rape victim showing similar circumstances surrounding both rapes was admissible under Rule 404(b) because it showed the defendant's motive, intent, and plan to rape the victim there. *See also Davis v. State,* 362

Ark. 34, 207 S.W.3d 474 (2005) (evidence that youth minister made sexual advances toward a church member was admissible to show that his forced sexual interaction with another church member was not consensual); *Burmingham v. State,* 342 Ark. 95, 27 S.W.3d 351 (2000) (evidence of similarities in way rape of first victim was perpetrated was admissible to show similar scheme and intent when rape of second victim was committed); *Sasser v. State,* 321 Ark. 438, 902 S.W.2d 773 (1995) (testimony of first victim, a convenience store clerk, regarding defendant's rape and attempted murder of her was admissible to prove defendant's intent to kill a second convenience store clerk several years later).

Here, the trial judge ruled that a redacted version of the Michigan Department of Correction Presentence Investigation was admissible because it contained Creed's statement admitting his attempt to commit a rape similar to he [sic] rape he was alleged to have committed in Arkansas. Creed said:

> I was watching her at the lake and I watched her all day and my dick got hard and I thought to talk to her but I wanted a blow job so I came to her and say suck my cock and I was going to make her put oral sex on me but I ran and her family hold me down till the police go there than [sic] I went to jail.

Based on our prior rulings finding evidence showing similarities between rapes as admissible under Rule 404(b) to show similar scheme and intent,

motive, preparation, and plan, the trial court here did not abuse its discretion in allowing the admission of Creed's Michigan presentence report showing similarities to the present rape in Arkansas. Further, because this evidence was admissible under Rule 404(b), the trial court did not err in denying Creed's motion for a mistrial when Officer Almond stated that the letter from the Arkansas State Crime Lab reflected Creed's residence was at the Deerfield Correctional Facility.

Creed also argues that the trial court erred by allowing into evidence an order from the Juvenile Division of the Hot Spring Circuit Court, indicating that Creed pled guilty to a charge of attempted kidnapping, reduced to assault in 2001. However, the order was admitted into evidence without Creed's objection, and his failure to make a contemporaneous objection prevents him from asserting any error on the part of the trial court. *See McClain v. State,* 361 Ark. 133, 205 S.W.3d 123 (2005).

Finally, Creed asserts that even if the redacted Michigan presentence report was relevant, the trial court erred in admitting it over his objection because it was unfairly prejudicial under Ark. R. Evid. 403. When reviewing a circuit court's ruling under Rule 403, this court applies an abuse-of-discretion standard. *Flanery v. State,* 362 Ark. 311, 208 S.W.3d 187 (2005). Reviewing a trial court's ruling under Rule 403, we have noted that "it is likely that evidence offered by the state will be prejudicial to the accused, or it probably would not be offered"; however, the

evidence should not be excluded unless the accused can show that the evidence lacks probative value in view of the risk of unfair prejudice to the defendant. *Beed v. State,* 271 Ark. 526, 542, 609 S.W.2d 898, 909 (1980). Although admission of the Michigan presentence report was prejudicial to Creed, the similarities between the rape there and the rape at issue here were sufficient to make this evidence probative on the issue of Creed's motive, intent, preparation, plan, and scheme. Based on the broad discretion of the circuit court in weighing the probative value of the evidence against its prejudicial effect, the trial court did not abuse its discretion when it allowed this evidence under Rule 403. Accordingly, we find no error.

In accordance with Rule 4-3(h) of the Arkansas Supreme Court Rules, the record has been reviewed for all objections, motions, and requests made by either party, which were decided adversely to Creed, and no prejudicial error has been found.

Affirmed.

Leslie W. Steen
Clerk

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State of Arkansas
Arkansas Court of Appeals
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Little Rock, Arkansas 72201

March 6, 2008

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RE: CR 07 00556,
James Ray Creed v. State of Arkansas

Dear Attorneys:

The Arkansas Supreme Court made the following order today in the above styled case:

"Petition for rehearing is denied."

Sincerely,

/s/ Leslie W. Steen
Leslie W. Steen, Clerk

LWS:jko

cc: David R. Raupp, Sr. Asst. AG
Sue Jones, Clerk
(CR-06-195-2)